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# In the Supreme Court
OF THE
# United States

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OCTOBER TERM, 1972

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No. 72-714

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CALIFORNIA, *Petitioner,*

VS.

THE MUNICIPAL COURT FOR THE SACRAMENTO MUNICIPAL COURT DISTRICT OF SACRAMENTO COUNTY, et al.,
*Respondents.*

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**On Writ of Certiorari to the Court of Appeal of the State of California, Third Appellate District**

## BRIEF IN OPPOSITION

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Respondent Michael Alford appears by this Brief in Opposition and requests that the Court deny the Petition for Certiorari because petitioner has not set forth grounds which warrant issuance of the writ.

**ARGUMENT**

At issue is the validity of a California statute which has been authoritatively construed by the California Court of Appeal in an opinion which the California Supreme Court declined to review. This interpretation of the statute by the highest appellate Court which has construed it is binding on trial courts in California. *Auto Equity Sales v. Superior Court,* 57 Cal.2d 450, 455, 20 Cal.Rptr. 321, 369 P.2d 937 (1962). As construed, the statute clearly goes beyond an arguably permissible area of state control to embrace activities which are protected by the Constitution of the United States.

In such a situation this Court will determine the constitutionality of a state statute on the basis of the authoritative interpretation of the state courts. *Stromberg v. California,* 283 U.S. 359, 369, 51 S.Ct. 532, 75 L.Ed. 1117 (1930); *Cox v. Louisiana,* 379 U.S. 536, 551, 85 S.Ct. 453, 13 L.Ed.2d 471 (1964). Where a state Court, having authoritatively construed a state statute, erroneously concludes that the statute as construed is constitutional, this Court will overturn that conclusion to correct the error. *Stromberg v. California,* supra; *Cox v. Louisiana,* supra. However, this Court does not substitute its judgment for that of the state Courts to determine that state statutes found to be unconstitutionally broad should have been construed more narrowly. For this reason, the petition should be denied. However, certain points contained in the petition require comment.

The petition is misleading in that it states in several places that the California Court of Appeal held the flag *definition* statute (Section 611, California Military and Veterans Code) unconstitutional. This is incorrect. The Court of Appeal held the desecration statute (Section 614(d), Cal. Military and Veterans Code) unconstitutional because "as defined by Section 611 . . . it is void for overbreadth." *Alford v. Municipal Court,* 26 Cal.App.3d 244, 246, 102 Cal.Rptr. 667 (1972).

In arguing that the overbreadth doctrine should not have been applied here, the California Attorney General makes special reference to *Hoffman v. United States,* (D.C. Cir. 1971) 446 F.2d 226, and *Sutherland v. DeWulf,* (S.D. Ill. 1971) 323 F.Supp. 740. In *Hoffman* the United States Circuit Court of Appeals for the District of Columbia Circuit reversed a conviction of violating the federal flag desecration statute. Defendant's alleged criminal conduct consisted of "wearing a shirt which, while not actually a flag of the United States, resembled the flag sufficiently to come within the terms of the statute." *Hoffman v. United States,* supra, 446 F.2d at 227. The Court held that defendant's conduct did not come within the statute. *Id.* at 228.

Referring to the *Hoffman* case, the petition herein states: "Thus, the District of Columbia Circuit Court considers the federal flag definition statute, 18 U.S.C. § 700, which also includes pictures and representations as flags, as not being in violation of the over-

breadth doctrine." (*Petition for Writ of Certiorari*, p. 11.) This is incorrect. The Court specifically stated that it did not reach the constitutional question. *Hoffman v. United States, supra.* Thus, the *Hoffman* case does not support petitioner's contention that the overbreadth doctrine should not have been applied in the instant case.

In *Sutherland v. DeWulf,* supra, 323 F.Supp. 740, a three judge district Court refused to apply the overbreadth doctrine to an Illinois flag desecration statute. The Court first determined that the conduct of defendants—burning an American flag—did not enjoy first amendment privilege so as to make them immune from prosecution. The Court in *Sutherland* then contrasted that conduct with the privileged conduct of defendant in *Street v. New York,* 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969). *Sutherland* states at p. 748:

> We may assume, *arguendo,* that the statutory provision challenged in this case is susceptible of sweeping and improper application. That assumption would also apply to the statutory provision found in *Street.* It would seem to this court to be an anomaly, indeed, to apply the overbreadth doctrine in this case to void the statute where conduct of the parties challenging the statute is clearly not privileged, but to find the doctrine not applied in *Street* where the conduct of the person challenging a nearly identical statute was privileged . . .
>
> The majority opinion in *Street* gave no indication of why the overbreadth doctrine was not applied

there. This court does not presume to say, but it is clear that it was not an oversight.

The Court in *Sutherland* did not interpret *Street* properly. The reason the overbreadth doctrine was not applied in *Street* is that the Court was able to determine the case without reaching that issue. It reversed the conviction because the record indicated that defendant could have been convicted of violating the New York flag desecration statute because of his words alone.

Finally, the petition suggests that certiorari should be granted because there is a conflict between the Court of Appeal's decision in *Alford* and a decision by the Los Angeles Superior Court, sitting as the Appellate Division thereof, in *People v. Cowgill,* 274 Cal.App.2d Supp. 923, 78 Cal.Rptr. 853 (1969). The tribunal which decided *Cowgill* is inferior to that which decided *Alford,* and, to the extent the decisions are inconsistent, *Alford* supplants *Cowgill. Auto Equity Sales, Inc. v. Superior Court, supra.* It is worth noting in passing that the Superior Court judge's opinion in *Cowgill* contains language which is inconsistent with this Court's decision in *Cohen v. California,* 403 U.S. 15, 91 S.Ct. 1780, 29 L.Ed.2d 284 (1971), since *Cowgill* asserts that the statute can be justified as preventing potential breaches of the peace, a concept disapproved in *Cohen. Id.* at 403, U.S. 24-25.

## CONCLUSION

For the reasons stated above, respondent submits that the petition for Writ of Certiorari should be denied.

Dated, December 7, 1972.

Respectfully submitted,

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